Phung Hoe Seng v United Malayan Banking Corporation Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPLICATION NO B-08-302-1995
MAHADEV SHANKAR, VC GEORGE JJCA AND ABDUL MALEK J
31 JULY 1995

Civil Procedure *— Appeal — Leave to appeal — Value of subject matter — Principal and interest of loan accrued at date of application for order for sale more than RM250,000 — Whether interest owed at date of application could be included in calculating value of claim — Whether leave to appeal required — Courts of Judicature Act 1964 s 68(1)(a)*

Words and Phrases *— 'Exclusive of interest' — Courts of Judicature Act 1964 s 68(1)(a)*

The respondent ('the bank') granted Sykt Machinco (M) Sdn Bhd ('the borrower') a fixed loan of RM150,000, and an overdraft of RM100,000. On 3 February 1982, the applicant ('the chargor') created two charges over his land ('the land') in favour of the bank to secure the repayment of the fixed loan and the overdraft. The borrower later defaulted, and on 19 July 1993, the bank's solicitors commenced a foreclosure action against the chargor in the Shah Alam High Court. Although the combined claim in respect of the principal amount was RM250,000, the principal and interest accrued as at 19 July 1993 was RM527,632.70, ie RM225,789.88 under the first charge, and RM301,842.82 under the second charge. The High Court judge granted an order for sale to the bank. The chargor wanted to appeal, and his solicitors who took the view that leave was necessary under s 68(1)(a) of the Courts of Judicature Act 1964 ('the Act'), went on to file a motion ('the first application') headed 'the Court of Appeal' in the Shah Alam High Court. The registrar fixed the application for hearing on 24 March 1995. Realizing the mistake, the chargor's solicitors later filed another application ('the second application') in Kuala Lumpur for an order that the first application be deemed duly filed in the registry of the Court of Appeal in Kuala Lumpur. As the bank's solicitors was not informed of these developments, they appeared in the Court of Appeal on 24 March 1995, only to be told that there was no such motion pending for hearing. On 31 March 1995, the bank's solicitors were served with the notice of motion of the second application by the chargor's solicitors. At the hearing, the bank's solicitors complained about the absence of the chargor's solicitors on 24 March 1995. The Court of Appeal dismissed the second application, on the ground that no leave was required to appeal against the High Court order, as the claim was more than RM250,000. At that time, the prescribed period to file a notice of appeal had already lapsed. Instead of making a formal application for extension of time, the chargor's solicitors filed this

application ('the third application') in the Court of Appeal, again asking for leave to appeal. In the affidavit of third application, the chargor's solicitors alleged that the bank's solicitors's had mislead the court in making complaints about their absence and representing to the court that the principal sum payable was RM250,000. The chargor's solicitors alleged that the actual principal amount outstanding exclusive of interest was only RM208,611.24, and leave was thus required.

Held, dismissing the application:

(1) The effect of r 27(1) of the Rules of the Court of Appeal 1994 read with the definition of 'Court' in r 2 makes it imperative for all applications to the Court of Appeal to be filed in its registry in Kuala Lumpur. Therefore, the registrar at Shah Alam had erroneously signed the motion and fixed it for disposal on 24 March 1995.

(2) Section 68(1)(a) of the Act, inter alia, prohibits the bringing of an appeal when the value of the subject matter of the claim, exclusive of interest, is less than RM250,000, except with the leave of the Court of Appeal. The words 'exclusive of interest' under s 68(1)(a) refer to the amount of the interest which the court awards upon its judgment on the date of final order, and not to interest which has accrued up to the date of judgment.

(3) In a foreclosure action, the value of the bank's claim is the total amount due on the date on which the order for sale was sought. In this case, the combined amount of principal and interest due under both charges on 19 July 1993 was RM527,632.70. As the value of the subject matter of the claim was more than RM250,000, no leave of the Court of Appeal was required.

(4) Even if the court had made a wrong decision in dismissing the second application on 24 April 1995, the chargor's solicitors' remedy was to file an appeal to the Federal Court, and not to apply again for leave to appeal.

(5) With regard to the chargor's solicitors' allegations of serious misconduct of the bank's solicitors, the court could not find any such evidence. It is a serious matter for one practitioner to accuse another of wilfully misleading the court. If such accusations are made in future without good reasons, the court itself shall initiate the necessary disciplinary action.

[Bahasa Malaysia summary

Penentang ('bank itu') telah memberikan Sykt Machino (M) Sdn Bhd ('peminjam itu') suatu pinjaman tetap sejumlah RM150,000 dan suatu overdraf sejumlah RM100,000. Pada 3 Februari 1982, pemohon ('penggadai itu') telah membuat dua gadaian atas tanahnya ('tanah itu') yang memihak kepada bank untuk menjamin pembayaran balik pinjaman tetap dan overdraf itu. Peminjam kemudiannya ingkar,

dan pada 19 Julai 1993, peguamcara bank telah memulakan suatu tindakan perampasan terhadap penggadai di Mahkamah Tinggi Shah Alam. Walaupun jumlah tuntutan pokok ialah RM250,000, pokok dan faedah yang terakru sehingga 19 Julai 1993 ialah RM527,623.70, iaitu RM225,789.88 di bawah gadaian pertama, dan RM301,842,82 di bawah gadaian kedua. Hakim Mahkamah Tinggi telah memberikan suatu perintah jualan kepada bank. Penggadai ingin merayu, dan peguamcaranya yang berpendapat bahawa kebenaran adalah diperlukan di bawah s 68(1)(a) Akta Mahkamah Kehakiman 1964 ('Akta itu') pun memfailkan suatu usul ('permohonan pertama') yang bertajuk 'Mahkamah Rayuan' di Mahkamah Tinggi Shah Alam. Pendaftar telah menetapkan perbicaraan permohonan tersebut pada 24 Mac 1995. Menyedari tentang kesilapan tersebut, peguamcara penggadai itu telah memfailkan suatu lagi permohonan ('permohonan kedua') di Kuala Lumpur untuk suatu perintah bahawa permohonan pertama dianggap sebagai telah difailkan seperti yang sepatutnya di pejabat pendaftaran Mahkamah Rayuan di Kuala Lumpur. Oleh kerana peguamcara bank tidak dimaklumkan mengenai perkembangan ini, mereka telah hadir di Mahkamah Rayuan pada 24 Mac 1995, dan hanya pada masa itu, mereka diberitahu bahawa tidak ada usul untuk dibicarakan. Pada 31 Mac 1995, peguamcara bank telah disampaikan dengan notis usul permohonan kedua oleh peguamcara penggadai. Semasa perbicaraan, peguamcara bank telah membuat aduan tentang ketidakhadiran peguamcara penggadai pada 24 Mac 1995. Mahkamah Rayuan menolak permohonan kedua atas alasan bahawa tidak ada kebenaran yang diperlukan untuk merayu terhadap perintah Mahkamah Tinggi, kerana tuntutan yang berkenaan adalah melebihi RM250,000. Ketika itu, tempoh yang ditetapkan untuk memfailkan notis rayuan telahpun luput. Peguamcara penggadai tidak membuat suatu permohonan formal untuk melanjutkan masa, tetapi sebaliknya memfailkan permohonan ini ('permohonan ketiga') di Mahkamah Rayuan sekali lagi untuk memohon kebenaran untuk merayu. Di dalam afidavit permohonan ketiga, peguamcara penggadai mengatakan bahawa peguamcara bank telah mengelabui mahkamah dalam membuat aduan tentang ketidakhadiran mereka, dan dengan mengatakan kepada mahkamah bahawa jumlah pokok yang harus dibayar ialah RM250,000. Peguamcara penggadai menyatakan bahawa jumlah pokok terhutang sebenar yang tidak termasuk faedah adalah hanya RM208,611.24 dan oleh itu kebenaran diperlukan.

Diputuskan, menolak permohonan itu:

(1) Kesan k 27(1) Kaedah-Kaedah Mahkamah Rayuan 1994 dibaca dengan takrif 'Mahkamah' dalam k 2 menjadikannya imperatif untuk kesemua permohonan kepada Mahkamah Rayuan difailkan di pejabat pendaftaran di Kuala Lumpur. Maka, pendaftar di Shah Alam telah dengan silap menandatangani usul dan menetapkannya untuk dibicarakan pada 24 Mac 1995.

(2) Seksyen 68(1)(a) Akta itu, antara lain, menghalang rayuan dibuat apabila nilai perkara tuntutan, tidak termasuk faedah, adalah kurang daripada RM250,000, kecuali dengan kebenaran Mahkamah Rayuan. Perkataan 'tidak termasuk faedah' di bawah s 68(1)(a) merujuk kepada jumlah faedah yang diaward oleh mahkamah atas penghakimannya pada tarikh perintah muktamad, dan bukan faedah yang terakru sehingga tarikh penghakiman.

(3) Dalam suatu tindakan perampasan, nilai tuntutan bank ialah jumlah yang perlu dibayar pada tarikh apabila perintah jualan dipohon. Dalam kes ini, jumlah pokok dan faedah tergabung di bawah kedua-dua gadaian yang perlu dibayar pada 19 Julai 1993 adalah RM527,623.70. Oleh kerana nilai perkara tuntutan adalah lebih daripada RM250,000, kebenaran Mahkamah Rayuan tidak diperlukan.

(4) Meskipun mahkamah telah membuat suatu keputusan yang salah dengan menolak permohonan kedua pada 24 April 1995, remedi peguamcara penggadai sudah tentunya ialah memfailkan suatu rayuan kepada Mahkamah Persekutuan, dan bukan memohon sekali lagi untuk kebenaran untuk merayu.

(5) Mengenai pengataan peguamcara penggadai bahawa peguamcara bank telah melakukan salah laku yang serius, mahkamah tidak dapat mencari sebarang keterangan yang menunjukkan demikian. Adalah merupakan suatu perkara yang serius bagi seorang pengamal untuk menuduh seorang yang lain sebagai mengelabui mahkamah secara sengaja. Jika pertuduhan sedemikian dibuat di masa depan tanpa sebab yang baik, mahkamah sendiri akan memulakan tindakan tatatertib yang perlu.]

Notes

For cases on leave to appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 477–506.

Legislation referred to

Courts of Judicature Act 1964 s 68(1)(a)
National Land Code 1965 Form 16D
Rules of the Court of Appeal 1994 rr 2, 27(1)
Rules of the High Court 1980 O 83 r 3(3)

Appeal from: Originating Summons No 24–529 of 1993 (High Court, Shah Alam)

Ram Singh (*Dusing & Co*) for the applicant.
Mohamed Ismail Shariff (*K Thavakumar* with him) (*Mohamed Ismail & Co*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA: After we dismissed an earlier application for leave to appeal, the applicant filed this application. Instead of appealing for extension of time to file the notice of appeal, this second application is also for leave to appeal. We dismissed it but reserved our decision on the proper order for costs which we should make.

On 3 February 1982, the applicant ('the chargor') charged his land ('the said land') in Port Klang to the respondent ('the bank') to secure the repayment of a capital sum of RM150,000 to be lent to a company called Sykt Machinco (M) Sdn Bhd ('Machinco'). On the same day, the chargor created a second charge in favour of the bank over the said land to repay another loan also to Machinco of which the capital sum was RM100,000. The first debt for RM150,000 was by way of a fixed loan and the second was a secured overdraft, and interest was also payable.

In February 1993, the bank's solicitors served the notice of default in Form 16D of the National Land Code 1965. Upon the failure of the chargor to remedy his default, the bank's solicitors commenced a foreclosure action by way of an originating summons dated 19 July 1993 in the High Court at Shah Alam. The affidavit in support sets out the statutory particulars under O 83 r 3(3) of the Rules of the High Court 1980. The principal amount under the first charge was stated to be RM150,000 and under the second charge, RM100,000. The combined claim in respect of principal was therefore RM250,000. The previous amount of the repayments under the first charge was RM108,611.34.

However, with the interest accrued due as at 19 July 1993, the principal and interest under the first charge was RM225,789.88. The principal and interest under the second charge was RM301,842.82. The combined total amount of principal and interest under both charges was therefore RM527,632.70. Under the first and second charges, the continuing daily interest was RM77.09 and RM90.97, respectively.

The chargor filed a contentious affidavit disputing the right of the bank to obtain relief, and the matter came up before James Foong J on 15 November 1994. He found the chargor's contention devoid of merit. He then made an order in terms of the bank's application and set the date for the sale of the land on 21 February 1995.

Section 68(1)(a) of the Courts of Judicature Act 1964 ('the Act'), inter alia, prohibits the bringing of an appeal:

> ... when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

It is to be noted that leave is only required where the amount or value of the subject matter of the claim is less than RM250,000. In other words, if the amount or value of the subject matter of the claim is RM250,000 or more, no leave of the Court of Appeal is required.

Even if we assume that the value of the subject matter of this claim (exclusive of interest) is equivalent to the amount of the principal only

under the first and second charges, the total amount of the claim was RM250,000, and therefore no leave of the Court of Appeal was required. A

However, the chargor's solicitors took the view that leave was required and filed a motion headed 'the Court of Appeal' but in the High Court at Shah Alam to be issued by the 'Pendaftar, Mahkamah Rayuan Malaysia, Shah Alam'. B

The effect of r 27(1) of the Rules of the Court of Appeal 1994 read with the definition of 'Court' in r 2 makes it imperative for all applications to the Court of Appeal to be filed in its registry in Kuala Lumpur. Therefore, the registrar at Shah Alam quite erroneously signed the motion and fixed it for disposal on 24 March 1995. C

On 11 February 1995, the chargor's solicitors served an unsealed copy of this motion on the bank's solicitors together with an affidavit in support.

On 16 February 1995, the registry at Shah Alam informed the chargor's solicitors that this motion would be rejected. D

The same day, the chargor's solicitors wrote to the registrar requesting her not to reject the motion because they would be filing another motion in the Court of Appeal in Kuala Lumpur requesting for an order that this motion be deemed duly filed so as to enable the application to be proceeded with. A copy of this letter was not extended to the bank's solicitors, who were therefore left to assume that the application could be proceeded with on 24 March 1995. E

On 1 March 1995, the chargor's solicitors filed another application at Kuala Lumpur. In this motion, they prayed for an order that the earlier motion filed in Shah Alam on 12 December 1994 be deemed duly filed in the registry of the Court of Appeal in Kuala Lumpur and be proceeded with. This motion was fixed for disposal on 24 April 1995. F

Meanwhile, still not having been informed by the chargor's solicitors of these developments, the bank's solicitors appeared in the Court of Appeal on 24 March 1995, only to be told that there was no such motion pending for disposal. The chargor's solicitors were not present. The bank's solicitors wrote a letter of protest to the chargor's solicitors, not only got no satisfaction but were sharply told that their complaints 'were indigestible' (sic). G

On 31 March 1995, the bank's solicitors were served with the second notice of motion filed by the chargor's solicitors in Kuala Lumpur. They again protested and said that they would take the necessary objection at the hearing in the Court of Appeal. H

The matter then came up before us on 24 April 1995. We allowed a minor amendment to the motion in respect of a typographical error in the number, went on to hear arguments on the motion proper for leave, and dismissed it with costs. I

We did so because, in our view, no leave was required to appeal against the order made by the High Court in Shah Alam on 15 November

A 1994. The chargor's solicitors' application in the High Court at Shah Alam was misconceived for the reasons aforesaid. The second application in the Court of Appeal was also misconceived because no leave was required.

Not having filed the notice of appeal within the prescribed period, we B indicated that the chargor's solicitors should make a formal application for extension of time to file the notice of appeal. Such an application requires a supporting affidavit setting out a reasonable excuse for the omission and also the merits of the appeal.

This they did not do. Instead, on 18 May 1995, they filed the present C application in this court again asking for leave under s 68(1)(a) of the Act, and that if leave is granted, they were to be given 14 days to file the notice of appeal, and for costs and other relief. The affidavit in support of this application was affirmed by Mr Ram Singh of counsel who appears to have the conduct of this matter on behalf of the chargor. After setting out the factual history of his misadventures commencing from the filing of the D application for leave in the wrong court and ending with its dismissal on 24 April 1995, he proceeded to make serious allegations against the bank's solicitors who had the conduct of this matter, ie Mr Thavakumar. First, he alleged that Mr Thavakumar's letter dated 24 March 1995 complaining of his abortive attendance in the Court of Appeal on 24 March 1995, and his further letter of 31 March 1995 requesting clarification of the second E motion filed by the chargor's solicitors, were both written with the sole intention of misleading this court.

Then, Mr Ram Singh alleged that Mr Thavakumar had further misled this court on 24 April 1995 by representing that the principal sum payable is RM250,000 and therefore no leave was required. He claimed F that this constituted grave misconduct, and should be viewed seriously and he contended that the actual principal amount outstanding *exclusive of interest* is RM208,611.24.

Mr Thavakumar filed an affidavit in response denying the charges of misleading the court and set out what happened in court on 24 April 1995.

G It became quite obvious in the course of argument how Mr Ram Singh had obtained the figure of RM208,611.24. He had merely added the total amount of the repayments of RM108,611.24 to the principal amount of RM100,000 due under the second charge.

What concerns us is that he did not care to justify this method of H calculation. This was a foreclosure action and the value of the bank's claim was the total amount due on the date on which the sale order was sought, and this was RM255,789.88 under the first charge and RM301.842.82 under the second charge.

Here we must explain that the words *exclusive of interest* under I s 68(1)(a) of the Act must, in our view, refer to the amount of the interest which the court awards upon its judgment on the date on which it pronounces its final order. In our opinion, it does not apply to interest which has accrued up to the date of the judgment because any other

construction of these words would be to strain its purpose beyond permissible limits of construction. In any event, if we had made a wrong decision in dismissing the earlier application for leave on 24 April 1995, the chargor's solicitors' remedy was surely to file an appeal to the Federal Court, and not to apply again for leave to appeal.

Turning now to Mr Ram Singh's allegations of serious misconduct against the bank's solicitors, we would categorically state that we cannot find any evidence whatsoever of any intention on the part of the bank's solicitors to mislead this court nor was the court misled. The bank's solicitors' acts were all done in the proper performance of their duty to this court and we are of the unanimous opinion that they should be vindicated. In the course of the proceedings before us, we repeatedly provided opportunities to Mr Ram Singh to withdraw his allegations when it should have been obvious even to him that he was sadly mistaken. He refused.

We have noticed an unhappy trend that some practitioners are a little too ready to attack their opponents with allegations of misleading the court when a contrary submission is made by way of a different interpretation of the same facts. It is a serious matter for one practitioner to accuse another of wilfully misleading the court. We deplore this tendency and feel obliged to give notice that if such accusations are made in future without good reasons to justify them, we should take it upon ourselves to initiate the necessary disciplinary action.

In the present case, we hope that the chargor's solicitors will take cognizance of the remarks that we have made, and that this aspect of the problem may yet be resolved by the lawyers concerned inter partes, failing which the bank's solicitors shall have their remedies. As far as the present application is concerned, we think that the ends of justice will be served by an order which we now make that the costs of this application be taxed on a solicitor and client basis, and be paid by the chargor to the bank.

Order accordingly.

Reported by Isabel Liong